

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 GARRETT HOFFMAN,
12 CDCR #F-39330,

13 Plaintiff,

14 vs.
15 D. KHATRI; C. COOK; S. AYMAR;
16 N. TETTEH; C. NAVAMANI;
C. LAI; S. KO,

17 Defendants.

Civil No. 09-0172 DMS (RBB)

**ORDER GRANTING DEFENDANTS'
TETTEH AND NAVAMANI'S
MOTIONS TO DISMISS FOR
FAILING TO STATE A
CLAIM PURSUANT
TO FED.R.CIV.P. 12(b)(6)**

[Doc. Nos. 26, 27]

18
19 I.

20 PROCEDURAL BACKGROUND

21 Garrett Hoffman (“Plaintiff”), a prisoner currently incarcerated at Centinela State Prison
22 (“CEN”) in Imperial, California, proceeding pro se and *in forma pauperis*, filed this civil rights
23 action pursuant to 42 U.S.C. § 1983 on January 27, 2009. Plaintiff alleges Defendants violated
24 his right to be free of cruel and unusual punishment by failing to provide him adequate medical
25 care. (Compl. at 2-4, 9.) Plaintiff seeks \$500,000 in general and punitive damages. (Id. at 16.)

26 On July 22, 2009 and December 9, 2009, the Court granted Motions to Dismiss filed on
27 behalf of Defendants Khatri, Cook, Ko and Lai pursuant to FED.R.CIV.P. 12(b)(6). The
28 remaining Defendants, N. Tetteh and C. Navamani have since filed their own Motions to

1 Dismiss pursuant to FED.R.CIV.P. 12(b)(6) [Doc. Nos. 26, 27]. Because Defendant Tettah's
 2 Motion seeks to limit Plaintiff's claims based on the specificity of his CDC 602 administrative
 3 grievance pursuant to 42 U.S.C. § 1997e(a), the Court provided Plaintiff with notice and an
 4 opportunity to include in his opposition evidence of exhaustion pursuant to 42 U.S.C. § 1997e(a)
 5 [Doc. No. 28]. *See Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003). Plaintiff has filed
 6 no opposition, however. Consequently, neither Defendant Tettah nor Navamani filed a reply.

7 The Court has determined that Defendants' Motions are suitable for disposition upon the
 8 papers without oral argument and that no Report and Recommendation from Magistrate Judge
 9 Ruben B. Brooks is necessary. *See* S.D. CAL. CIVLR 7.1(d)(1), 72.3(e).

10 II.

11 PLAINTIFF'S FACTUAL ALLEGATIONS

12 On August 5, 2007, Plaintiff was incarcerated at Centinela State Prison ("CEN").
 13 (*See* Compl. at 1.) While Plaintiff was working in the Facility "D" kitchen and carrying ten
 14 sheet pans, he slipped on a puddle of water on the floor, fell, and injured his back. (*Id.* at 4; *see*
 15 also Pl.'s Ex. B [Doc. No. 1-1] at 17-18.) A prison Medical Technical Assistant ("MTA")
 16 placed Plaintiff on a backboard to transport him to the Central Health; however, Plaintiff claims
 17 he fell off the backboard twice because he was not properly strapped down by the MTA.
 18 (Compl. at 4.)

19 At Central Health, Plaintiff was examined in the Treatment Triage Area and claims he
 20 was prescribed aurazine and ibuprofen for his "excruciating pain," but he claims neither had any
 21 effect. (*Id.*) The discharge instructions signed by both Plaintiff and Defendant Tetteh dated
 22 August 5, 2007, however, indicate Dr. Tetteh specifically prescribed baclofen, motrin and ultram
 23 on that day. (*See* Pl.'s Ex. B at 16.) In his Physician's Orders (CDC Form 7221) also dated
 24 August 5, 2007, Dr. Tetteh further ordered an x-ray of Plaintiff's spine and relieved him from
 25 kitchen duty for 30 days. (Pl.'s Ex. B at 21.)

26 On August 7, 2007, Plaintiff appeared for a follow-up examination, complained to Dr.
 27 Ko of continued lower lumbar pain, and reported he "never got his meds delivered to him." (*Id.*
 28 at 23 "Interdisciplinary Progress Notes" CDC Form 7230.) Dr. Ko checked with the pharmacy,

1 confirmed Plaintiff's pain medication would be delivered that day, gave Plaintiff a shot of
 2 Toradol and released him back to custody with instructions to "rest with minimal activities" and
 3 follow-up by procuring his medication on the yard med-line. (*Id.* at 24.)

4 On August 13, 2007, Plaintiff filled out a Health Care Services Request Form ("CDCR
 5 7362"), in which he requested to see a doctor, complained of "extreme pain," and reported his
 6 medication was "not working." (*Id.* at 26.) Plaintiff also claimed to have not received a "copy
 7 of [his] work lay-in" or the x-ray Dr. Tetteh ordered on August 5, 2007. (*Id.*) On August 15,
 8 2007, Dr. Tetteh issued a CDCR 7393 Notification of Diagnostic Test Results, informing
 9 Plaintiff he was being scheduled for a follow-up medical appointment regarding his x-ray. (*Id.*
 10 at 29.) On August 17, 2007, Correctional Sergeant Villeneuve noted Plaintiff's assignment
 11 change and on August 23, 2007, Plaintiff's Outpatient Interdisciplinary Progress Notes indicate
 12 he was again examined in Central Health. At that time, Plaintiff's Medical Lay-In Order was
 13 extended for two additional days, he was prescribed additional motrin and baclofen, and
 14 authorized for a new mattress. (*Id.* at 31-34.) Plaintiff submitted CDCR 7362s again on
 15 September 2, 2007 and September 7, 2007—both times requesting follow-ups with a doctor,
 16 reporting severe pain, ineffective medication, need for a back brace and trouble sleeping. (*Id.*
 17 at 35-36.)

18 On September 10, 2007, Plaintiff was examined by the "yard MD," referred for a 30-day
 19 specialty physical therapy consult, and advised to continue gentle stretching. Plaintiff was
 20 further prescribed naprosyn. (*Id.* at 37-42.) Three days later on September 13, 2007, and again
 21 on September 26, 2007, Plaintiff submitted CDC Form 7362s requesting to see a doctor,
 22 complaining of severe back pain and ineffective medication. (*Id.* at 43, 44.)

23 On October 10, 2007, Plaintiff was examined by Dr. Aymar, who reviewed his x-ray,
 24 noted Plaintiff's continued prescriptions for naprosyn and baclofen, ordered another for Tylenol
 25 #3, continued physical therapy and authorized a 2-month follow-up regarding Plaintiff's lower
 26 back pain. (*Id.* at 45, 48.) Plaintiff's Interdisciplinary Progress Notes (CDC Form 7230)
 27 thereafter show Plaintiff reported to the medical clinic every day from October 10, 2007 through
 28 November 4, 2007, where he continued to report lower back pain and where he received doses

1 of Tylenol #3 three times each day. (*Id.* at 49-55, 61.) On November 1, 2007, Plaintiff again
 2 requested to see a doctor. (*Id.* at 56.)

3 Plaintiff was examined again by Dr. Ko on November 5, 2007. (*Id.* at 59.) Dr. Ko
 4 injected Plaintiff with toradol, prescribed ibuprofen and motrin and approved Plaintiff for
 5 crutches for 2 weeks. (*Id.* at 59-60, 62.) Plaintiff continued to report to the clinic on November
 6 through 8, 2007, where he received Tylenol #3 twice a day. On November 6, 2007, however,
 7 Plaintiff's Interdisciplinary Progress Notes indicate he returned the crutches prescribed by Dr.
 8 Ko because he found it "hard to move around." (*Id.* at 63.) On November 8, 2007, Plaintiff was
 9 examined by Dr. Aymar, where he reported feeling "looser" and admitted returning the crutches
 10 because he "didn't need" them. (*Id.* at 66.) Plaintiff was advised to "continue gentle stretching,"
 11 and engaged in an "extensive discuss[ion] re: chronic nature of his LBP (lower back pain)." (*Id.*)
 12 Following this consult, Dr. Aymar discontinued Plaintiff's prescription for ibuprofen, and
 13 authorized "no RF (refill) of Tylenol #3 as not indicated." (*Id.*) Dr. Aymar did, however,
 14 prescribe naproxyn and 650 mg of Tylenol, as well as physical therapy. (*Id.* at 65.)

15 On November 9, 2007, Plaintiff requested a cane "because it was hard to use crutches."
 16 (*Id.* at 67, 69.) Plaintiff's medical records further indicate he was prescribed baclofen, toradol,
 17 ibuprofen, naproxen, acetominophen, and motrin for pain from November 5, 2007 through
 18 January 24, 2008 by Drs. Tetteh, Ko and Aymar. (*Id.* at 77.)

19 On November 16, 2007, Plaintiff filed CDC 602 Inmate/Parolee Appeal Log No. CEN-
 20 07-01515, "formally request[ing] a cane, to be seen by a back specialist, [and] medication
 21 consistently given to help the severe and excruciating pain in his lower back." (Pl.'s Ex. A at
 22 2-4.) On December 12, 2007, C. Cook, a CEN Health Care Appeal Coordinator partially granted
 23 Plaintiff's appeal. (Compl. at 5; Pl.'s Ex. A at 2.) Cook "partially granted" Plaintiff's grievance
 24 insofar as he had been examined by Dr. Aymar on December 6, 2007, and his prescription for
 25 tylenol and naprosyn dated November 8, 2007 remained valid for three months. Cook further
 26 noted that Plaintiff had refused a previously physical therapy appointment because it conflicted
 27 with a family visit, but noted that Dr. Aymar had since "reordered" a physical therapy consult.
 28 (*Id.*) Plaintiff's request for a cane and referral to a back specialist was denied, however, because

1 “there [wa]s no MD order for a cane or an orthopedic referral.” (*Id.*)

2 Plaintiff appealed this decision to the first formal level, repeating his request for a cane,
 3 back specialist and pain medication. On February 5, 2008, his appeal was again partially granted
 4 by C. Cook, CEN’s Health Care Appeals Coordinator, and Dr. Khatri, CEN’s Chief Physician.
 5 (Compl. at 5-6; Pl.’s Ex. A at 8.) Again, Plaintiff’s appeal was denied insofar as “there [wa]s
 6 no physician order for [Plaintiff] to possess a cane” and “no referral to a back specialist.” (Pl.’s
 7 Ex. A at 8.) Cook and Khatri did review Plaintiff’s medication profile, noting that “Ibuprofen,
 8 Ultram, Baclofen, Acetamin/Codeine, Toradol and Naproxen ha[d] all been prescribed and
 9 dispensed on an ongoing basis to use for pain control since 7/25/07.” (*Id.*) Plaintiff’s first level
 10 review also noted Plaintiff “received a face-to-face nurse triage on 1/18/08 with R.N. Manaig
 11 to address [his] medical concerns” and that Plaintiff had been scheduled for a “follow-up MD
 12 line” in early March where his “attending clinician w[ould] determine if further treatment is
 13 indicated.” Finally, Cook and Khatri noted Plaintiff “continued to receive physical therapy
 14 services and [would] not be permitted to dictate [his] own course of treatment.” (*Id.*)

15 On February 9, 2008, Plaintiff appealed to the Second Level of administrative review,
 16 again requesting a cane, referral to a back specialist and repeating complaints that his pain
 17 medication schedule was inconsistent. (Compl. at 7; Pl.’s Ex. A at 3.) On April 21, 2008, N.
 18 Barreras, the Chief Medical Officer/Health Care Manager at CEN reviewed Plaintiff’s appeal
 19 and, once again, partially granted Plaintiff’s requests. (Compl. at 7; P.’s Ex. A at 7.)
 20 Specifically, Dr. Barreras noted Plaintiff was examined by Defendant Dr. Navamani on February
 21 26, 2008, who ordered a “routine orthopedic consultation.” (*Id.*; *see also* Pl.’s Ex. C at 79 “CDC
 22 7243 Physician Request for Services.”) Plaintiff was advised that “routine services are
 23 scheduled chronologically and that [he] w[ould] be ducated accordingly. Any treatment
 24 recommendations from th[e] outside contracted specialist will be reviewed and considered by
 25 CDCR staff according to medical services treatment criteria.” (Pl.’s Ex. A at 7.) Dr. Barreras
 26 further noted that while “Baclofen was ordered on 3/13/08 and Robaxin was ordered on 3/27/08
 27 to use as needed for pain relief[,] [t]here continue[d] to be no medical recommendation for a
 28 cane at this time.” (*Id.*)

1 On March 27, 2008, CEN’s Medical Authorization Review Committee approved Plaintiff
2 for an orthopedic consult. (Compl. at 8; Pl.’s Ex. A at 5.) On April 24, 2008, Plaintiff was
3 examined by Dr. Lai in the Central Health orthopedic clinic. (Compl. at 8; *see also* Pl.’s Ex. A
4 at 5, 10.) Dr. Lai recommended a Magnetic Resonance Imaging (“MRI”). (*Id.*) On May 8,
5 2008, Plaintiff attended a follow-up visit with his primary care provider, who submitted a
6 referral for the MRI. (*Id.* at 8, Pl.’s Ex. A at 5.) Plaintiff was examined again by an
7 unidentified “primary care provider” on May 23, 2008 and June 9, 2008, but claims to have been
8 “deprived of Dr. Lai’s recommended MRI.” (Compl. at 8.)

On August 25, 2008, a Director’s Level Appeal Decision was issued denying Plaintiff’s administrative grievance. (*Id.*; *see also* Pl.’s Ex. A at 5-6.) While the Director’s Level Decision indicates Dr. Lai’s MRI referral was, in fact, still “pending approval” at the time, it further found “it [wa]s evident that [Plaintiff] ha[d] received and continue[d] to receive health care treatment services and treatment in accordance with regulation.” (Pl.’s Ex. A at 5.) Plaintiff was further advised that “licensed professional medical staff ha[d] evaluated [him] and determined the best course of treatment,” and that, pursuant to CAL. CODE REGS., tit. 15 § 3354(a), as an inmate, he would not be permitted to dictate his own course of medical care. (*Id.*)

17 Still dissatisfied, Plaintiff filed his § 1983 complaint in this Court, in which he continues
18 to disagree as to the sufficiency of his care, and in which he alleges Defendants Aymar,
19 Navamani, Ko and Tetteh, his primary care physicians since August 5, 2007, “have done nothing
20 which would correct the severe excruciating lower back pain” he continues to suffer. (Compl.
21 at 6.) As a result, Plaintiff concludes “all Defendants” have “delayed and deprived” him of
22 “corrective care [for his] sufficiently serious condition,” causing him “needless suffering” in
23 violation of the Eighth Amendment. (Compl. at 8-12.) He seeks \$500,000 in general and
24 punitive damages. (*Id.* at 16.)

III.

DEFENDANTS' MOTION TO DISMISS

A. Defendants' Arguments

28 Defendant Tetteh first argues that the court is limited in its consideration of Plaintiff's
Eighth Amendment claims because only the "issues" involving the availability of a cane, referral

1 to a back specialist and the administration of medication were “mentioned” in the CDC 602
 2 administrative grievance which Plaintiff exhausted to the Director’s Level of Review. (*See* Def.
 3 Tetteh’s Mem. of P&As in Supp. of Mot. to Dismiss (hereafter “Tetteh Mot.”) [Doc. No. 26-1]
 4 at 7-11.) Both Defendants Tetteh and Navamani further argue Plaintiff has failed to allege facts
 5 sufficient to show that they acted with deliberate indifference to Plaintiff’s serious medical needs
 6 in violation of the Eighth Amendment. (*Id.* at 12-16; Def. Navamani’s Mem. of P&As in Supp.
 7 of Mot. to Dismiss (hereafter “Navamani Mot.”)[Doc. No. 27-1] at 10-16.)

8 **B. FED.R.CIV.P. 12(b)(6) Standard of Review**

9 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) “tests the legal
 10 sufficiency of a claim” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Because Rule
 11 12(b)(6) focuses on the “sufficiency” of a claim rather than the claim’s substantive merits, “a
 12 court may [typically] look only at the face of the complaint to decide a motion to dismiss,” *Van*
 13 *Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002), and at any exhibits
 14 which are attached. *See* FED.R.CIV.P. 10(c) (“A copy of any written instrument which is an
 15 exhibit to a pleading is a part thereof for all purposes.”); *Schneider v. California Dept. of*
 16 *Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).

17 A motion to dismiss should be granted if a plaintiff’s complaint fails to contain “enough
 18 facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S.
 19 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that
 20 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
 21 alleged.” *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550
 22 U.S. at 556, 570).

23 While allegations of material fact are accepted as true and construed in the light most
 24 favorable to the nonmoving party, *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th
 25 Cir. 1996), the court need not accept as true generic legal conclusions, unwarranted deductions
 26 of fact or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
 27 (9th Cir. 2001); *Iqbal*, 129 S.Ct. at 1949 (“Threadbare recitals of the elements of a cause of
 28 action, supported by mere conclusory statements, do not suffice.”); *Twombly*, 550 U.S. at 555
 (on motion to dismiss court is “not bound to accept as true a legal conclusion couched as a

1 factual allegation.”). “The pleading standard Rule 8 announces does not require ‘detailed factual
 2 allegations,’ but it demands more than an unadorned, the defendant-unlawfully-harmed-me
 3 accusation.” *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555).

4 Thus, “[w]hile legal conclusions can provide the framework of a complaint, they must
 5 be supported by factual allegations. When there are well-pleaded factual allegations, a court
 6 should assume their veracity and then decide whether they plausibly give rise to an entitlement
 7 to relief.” *Iqbal*, 129 S.Ct. at 1950. “The plausibility standard is not akin to a ‘probability
 8 requirement,’ but it asks for more than a sheer possibility that defendant has acted unlawfully.”
 9 *Id.* at 1949. Where a complaint pleads facts that are “merely consistent with” a defendant’s
 10 liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”
 11 *Id.*; *Twombly*, 550 U.S. at 570 (when a plaintiff has not “nudged [his] claims across the line
 12 from conceivable to plausible, [his] complaint must be dismissed.”).

13 “In sum, for a complaint to survive a motion to dismiss, the non-conclusory ‘factual
 14 content,’ and reasonable inferences [drawn] from that content, must be plausibly suggestive of
 15 a claim entitling the plaintiff to relief.” *Moss v. United States Secret Service*, 572 F.3d 962, 969
 16 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1949).

17 C. Defendant Tetteh’s Exhaustion Argument

18 Defendant Tetteh first seeks dismissal of all claims which do not involve his request for
 19 a cane, referral to a back specialist, or the administration of prescribed medication on grounds
 20 that only these specific requests were mentioned in the CDC 602 appeal Plaintiff exhausted to
 21 the Director’s Level of Review as is required by 42 U.S.C. § 1997e(a).

22 Section 1997e(a) does not impose a pleading requirement, but rather, the failure to
 23 exhaust is an affirmative defense which Defendant Tetteh has the burden of raising and proving.
 24 *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). Enacted as part of the Prison Litigation
 25 Reform Act (“PLRA”), section 1997e(a) requires a prisoner exhaust all administrative remedies
 26 “as are available” before he files a civil action related to any condition of his confinement. *See*
 27 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516, 524 (2002). It is the prison’s own
 28 grievance process, however, and not the PLRA, which determines what steps a prisoner must
 take, and how specific his grievance must be in order to properly exhaust his claims under 42

1 U.S.C. § 1997e(a). *Woodford v. Ngo*, 548 U.S. 81, 90 (2006); *Jones v. Bock*, 549 U.S. 199, 218
 2 (2007). In California, prisoners “[t]hree levels of formal review are provided, and a prisoner
 3 exhausts the grievance process when he completes the third level.” *Harvey v. Jordan*, 605 F.3d
 4 681, 683-84 (9th Cir. 2010) (citing CAL. CODE REGS., tit. 15 § 3084.1(a)); *see also id.* § 3084.5
 5 (“Levels of Appeal Review and Disposition”).

6 “A grievance … need not contain every fact necessary to prove each element of an
 7 eventual legal claim.” *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009). In fact, “when
 8 a prison’s grievance procedures are silent or incomplete as to factual specificity, ‘a grievance
 9 suffices if it alerts the prison to the nature of the wrong for which redress is sought.’” *Id.* (*citing*
 10 *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002)). “The primary purpose of a grievance is to
 11 notify the prison of a problem and facilitate its resolution, not to lay groundwork for litigation.”
 12 *Id.* Instead, it is the institution’s appeals process itself which defines the level of detail necessary
 13 for a prisoner to present his grievances. *Jones*, 549 U.S. at 218; *Griffin*, 557 F.3d at 1120.

14 In California, prisoners are required only to “use a CDC Form 602 … to describe the
 15 problem and the action requested.” CAL. CODE REGS., tit. 15 § 3084.2(a). Thus, so long as
 16 Plaintiff’s CDC 602 Form “provide[d] enough information … to allow prison officials to take
 17 appropriate measures,” “notif[ied] the prison of [his] problem,” and the “nature of the wrong
 18 for which redress is sought,” the exhaustion statute is satisfied. *Griffin*, 557 F.3d at 1120-21
 19 (internal citations omitted).

20 Here, Plaintiff’s Complaint involves only one constitutional claim: whether Defendants
 21 acted with deliberate indifference to his serious medical needs in violation of the Eighth
 22 Amendment. (Compl. at 4, 9.) Plaintiff asserts only one cause of action against various prison
 23 officials—all of them in some way involved in providing him medical care after he fell and
 24 injured his lower back on August 5, 2007. And while, in section “B” of his CDC 602 entitled
 25 “Action Requested,” Plaintiff does specifically “request[] a cane, to be seen by a back specialist,
 26 [and that] medication [be] consistently given to help the severe and excruciating pain in his
 27 lower back,” (Pl.’s Ex. A at 2), Section “A” of the CDC 602 Form, where he was asked to
 28 “describe the problem,” Plaintiff’s “additional attached sheet,” which is permitted by Cal. Code

1 Regs., tit. 15 § 3084.2(a)(1) to further permit the prisoner to “describe the problem and action
 2 requested,” as well as Sections D, F, and H—each requiring him to “explain reasons” for
 3 requesting Formal, Second and Third Level Review, make it abundantly clear that Plaintiff’s
 4 “problem” was his continued lower back pain, a perceived “total disregard for his needs,” and
 5 his belief that “medical staff” were subjecting him to “cruel and unusual prison conditions” and
 6 “ongoing inadequate medical care.” (*Id.* at 3.) This is more than sufficient information “to
 7 allow prison officials to take appropriate measures,” and to “notify the prison of [his] problem,”
 8 and the “nature of the wrong for which redress is sought.” *Griffin*, 557 F.3d at 1120-21.

9 Accordingly, the Court declines to limit its review of Plaintiff’s Eighth Amendment
 10 claims to only his requests for a cane, orthopedic consult and medication administration pursuant
 11 to 42 U.S.C. § 1997e(a), and instead will consider whether all Plaintiff’s allegations are
 12 sufficient to state a claim against Defendants Tetteh and Navamani.

13 **D. Inadequate Medical Care Claims**

14 Both Defendants Tetteh and Navamani further seek dismissal pursuant to FED.R.CIV.P.
 15 12(b)(6), however, on grounds that Plaintiff has failed to sufficiently plead the deliberate
 16 indifference required to support an Eighth Amendment violation as to either of them. (*See*
 17 Tetteh Mot. at 12-16; Navamani Mot. at 10-15.) For the reasons discussed below, the Court
 18 agrees.

19 **1. Eleventh Amendment**

20 Defendant Navamani first seeks dismissal, in part, on grounds that Plaintiff’s official
 21 capacity claims are barred by the Eleventh Amendment. (Navamani Mot. at 12, 15-16.)

22 While the Eleventh Amendment bars a prisoner’s section 1983 claims against state actors
 23 sued in their official capacities, *Will v. Michigan Dep’t of State Police*, 4[91] U.S. 58, 66 (1989),
 24 it does not bar damage actions against state officials sued in their personal or individual
 25 capacities. *Hafer v. Melo*, 502 U.S. 21, 31 (1991); *Pena v. Gardner*, 976 F.2d 469, 472-73 (9th
 26 Cir. 1992). When a state actor is alleged to have violated both federal and state law and is sued
 27 for damages under section 1983 in his individual or personal capacity, there is no Eleventh
 28 Amendment bar, even if state law provides for indemnification. *Ashker v. California Dep’t of*

1 *Corrections*, 112 F.3d 392, 395 (9th Cir. 1997).

2 Plaintiff brings this § 1983 suit against Defendant Navamani in both his individual and
 3 official capacities. (*See* Compl. at 2.) The Supreme Court has made it clear that a plaintiff can
 4 establish personal liability in a section 1983 action simply by showing that each official acted
 5 under color of state law in deprivation of a federal right. *Hafer*, 502 U.S. at 25.

6 Consequently, the Court GRANTS Defendant Navamani's Motion to Dismiss on
 7 Eleventh Amendment ground—but only to the extent that Plaintiff seeks damages against him in
 8 his official capacity. The Eleventh Amendment imposes no bar to Plaintiff's damages action
 9 against either Dr. Navamani or Dr. Tetteh for acts or omissions alleged to have been taken in
 10 their personal capacities. *See Stivers v. Pierce*, 71 F.3d 732, 749 (9th Cir. 1995).

11 **2. Eighth Amendment**

12 To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison
 13 conditions must involve “the wanton and unnecessary infliction of pain.” *Rhodes v. Chapman*,
 14 452 U.S. 337, 347 (1981). A prisoner’s claim of inadequate medical care does not rise to the
 15 level of an Eighth Amendment violation unless (1) “the prison official deprived the prisoner of
 16 the ‘minimal civilized measure of life’s necessities,’” and (2) “the prison official ‘acted with
 17 deliberate indifference in doing so.’” *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004)
 18 (quoting *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (citation omitted)).

19 Before it can be said that a prisoner’s civil rights have been abridged, “the indifference
 20 to his medical needs must be substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical
 21 malpractice’ will not support this cause of action.” *Broughton v. Cutter Laboratories*, 622 F.2d
 22 458, 460 (9th Cir. 1980) (citing *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976)). “[A] complaint
 23 that a physician has been negligent in diagnosing or treating a medical condition does not state
 24 a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does
 25 not become a constitutional violation merely because the victim is a prisoner.” *Estelle*, 429 U.S.
 26 at 106; *see also Anderson v. County of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995).

27 A prison official does not act in a deliberately indifferent manner unless the official
 28 “knows of and disregards an excessive risk to inmate health or safety.” *Farmer v. Brennan*, 511

1 U.S. 825, 834 (1994). Deliberate indifference may be manifested “when prison officials deny,
 2 delay or intentionally interfere with medical treatment,” or in the manner “in which prison
 3 physicians provide medical care.” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992),
 4 *overruled on other grounds*, *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997)
 5 (en banc). Where a prisoner alleges delay in receiving medical treatment, he must show that the
 6 delay led to further harm. *Id.* at 1060 (citing *Shapely v. Nevada Bd. of State Prison Comm’rs*,
 7 766 F.2d 404, 407 (9th Cir. 1985)).

8 Here, neither Defendant challenges the objective basis for Plaintiff’s Eighth Amendment
 9 claim, *i.e.*, that he suffers from a “serious medical need.” (Compl. at 8.) Instead, both argue that
 10 Plaintiff’s allegations do not show they acted with deliberate indifference to that serious need.

11 In order to show deliberate indifference, Plaintiff must allege that both Drs. Tetteh and
 12 Navamani purposely ignored or consciously failed to respond to the gravity of his medical need.
 13 *McGuckin*, 974 F.2d at 1060; *Toguchi*, 391 F.3d at 1057. As for Dr. Tetteh, however, Plaintiff
 14 alleges only that he examined Plaintiff on August 5, 2007, the same day he was injured, and
 15 prescribed baclofen, motrin and ultram for pain. (*See* Compl. at 4; Pl.’s Ex. B at 16.) Plaintiff’s
 16 own exhibits further show that it was Dr. Tetteh who: 1) ordered an x-ray of Plaintiff’s spine
 17 and relieved him from kitchen duty for 30 days; 2) notified Plaintiff on August 15, 2007 that he
 18 was being scheduled for a follow-up medical appointment regarding his radiological results; 3)
 19 requested Plaintiff be approved for routine physical therapy noting “degenerative arthritis of
 20 [his] l[ower]-spine with constant pain not relieved by brace / [illegible] / baclofen”; and 4)
 21 prescribed, along with Drs. Ko and Aymar, baclofen, toradol, ibuprofen, naproxen,
 22 acetominophen, and motrin for Plaintiff’s repeated complaints of pain continually from
 23 November 5, 2007 through January 24, 2008. (*See* Pl.’s Ex. B at 19, 21, 29, 38; Ex. C at 77.)

24 Plaintiff makes no further allegations against Dr. Tetteh, and most importantly, does not
 25 allege any facts to suggest that Dr. Tetteh was responsible for denying his request for a cane,
 26 more consistently or effectively managing the distribution of the pain medication he himself
 27 prescribed, deliberately indifferent to Plaintiff’s request for an orthopedic consult or the cause
 28 for any delay in receiving the MRI Dr. Lai ultimately recommended on April 24, 2008.

1 See *Iqbal*, 129 S. Ct at 1948 (“[P]laintiff must plead that each Government-official defendant,
 2 through the official’s own individual actions, has violated the Constitution.”). Instead,
 3 Plaintiff’s allegation against Tetteh amount to no more than a disagreement between Plaintiff
 4 and his doctors about the most effective course of treating his back pain. Such a disagreement
 5 does not rise to the level of deliberate indifference and thus, does not violate the Eighth
 6 Amendment. See *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996).

7 Plaintiff’s allegations against Dr. Navamani are even more sparse. Specifically, Plaintiff
 8 alleges only that it was Dr. Navamani who ordered a “routine orthopedic consultation” on
 9 February 26, 2008. (See Compl. at 7; Pl.’s Ex. C at 79 “CDC 7243 Physician Request for
 10 Services.”) “Deliberate indifference is a high legal standard.” *Toguchi*, 391 F.3d at 1060. To
 11 the extent that Plaintiff suggests Dr. Navamani should have ensured that Plaintiff receive an
 12 orthopedic consult sooner than April 24, 2008—when Plaintiff was examined by Dr. Lai in the
 13 orthopedic clinic—or should have prescribed some unspecified alternate courses of treatment, his
 14 claims sound in negligence and also do not rise to the level of cruel and unusual punishment.
 15 *Estelle*, 429 U.S. at 106.

16 Even when medical officials disagree as to the proper course of treatment, as may have
 17 been the case with respect to the final authorization of Plaintiff’s MRI, deliberate indifference
 18 is manifest only shown when the prisoner pleads facts sufficient to show “the course of treatment
 19 the doctors chose was medically unacceptable under the circumstances,” and that “they chose
 20 this course in conscious disregard of an excessive risk to [the prisoner’s] health.” *Jackson*, 90
 21 F.3d at 332; see also *Estelle*, 429 U.S. at 107 (“A medical decision not to order an x-ray, or like
 22 measures,” is a “classic example of a matter for medical judgment” which by itself “does not
 23 represent cruel and unusual punishment.”). *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir.
 24 1990) (Eighth Amendment is not violated merely because a prisoner’s treatment “was not as
 25 prompt or efficient as a free citizen might hope to receive.”).

26 In sum, in order to state an Eighth Amendment deliberate indifference claim against both
 27 Drs. Navamani and Tetteh Plaintiff must do more than simply conclude they were “wanton.”
 28 (Compl. at 2-3.) *Iqbal*, 129 S. Ct. at 1949. Instead, Plaintiff must support this conclusion with

1 well-pleaded facts which plausibly suggest deliberate indifference on both their parts. *Id.* at
2 1949-50; *Moss*, 572 F.3d at 969. This he has failed to do.

3 Accordingly, Defendant Tetteh and Navamani's Motions to Dismiss Plaintiff's Complaint
4 pursuant to FED.R.CIV.P. 12(b)(6) are **GRANTED**.

5 **IV.**

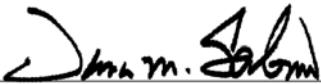
6 **CONCLUSION AND ORDER**

7 Based on the foregoing, the Court hereby **GRANTS** Defendant Tetteh and Defendant
8 Navamani's Motions to Dismiss Plaintiff's Complaint pursuant to FED.R.CIV.P. 12(b)(6) [Doc.
9 Nos. 26, 27]. Because the Court has previously provided Plaintiff with leave to amend to no
10 avail, and Plaintiff has elected to oppose none of the Motions to Dismiss filed by any Defendant
11 in this case, it now finds further opportunity to amend would be futile. *See Cahill v. Liberty Mut.
12 Ins. Co.*, 80 F.3d 336, 339 (9th Cir. 1996).

13 The Clerk shall close the file.

14 **IT IS SO ORDERED.**

15
16 DATED: August 3, 2010

17 
18 HON. DANA M. SABRAW
19 United States District Judge
20
21
22
23
24
25
26
27
28